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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-649

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JOSE CISNEROS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is set out in the Appendix to the Petition for Writ of Certiorari at pp. 119-154. The opinions of the district court are reported at 324 F. Supp. 599 and 330 F. Supp. 1377, and are set out in the Appendix at pp. 1-48 and 54-97, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on August 2, 1972 (A. 155). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

The district court herein found as a matter of fact that Mexican-American and Negro children in the Corpus Christi Independent School District had been segregated into separate schools because of their race and national origin through the actions of the School District. It held as a matter of law that these actions violated the rights of those students to the equal protection of the laws. The Court of Appeals upheld the district court's findings of fact and affirmed its holding in reliance on this Court's school desegregation decisions. Under these circumstances, is there any basis for a review of the lower court's holding by this Court?

Statement of the Case

This action was brought in 1968 in the United States District Court for the Southern District of Texas, pursuant to 42 U.S.C. § 1983, on behalf of Mexican-American and Negro parents and pupils on their own behalf and as representatives of the classes of Mexican-American and Negro pupils attending schools in the District. The case was brought to end the unconstitutional segregation of students by race and national origin in the District schools. After a lengthy trial the district court issued extensive findings of fact and conclusions of law. The court found that because of the actions of the defendant school officials both Negro and Mexican-American students had been segregated on the basis of their race and national origin from Anglo students.

On the basis of these findings, the district court required the immediate implementation of a comprehensive desegregation plan. A notice of appeal was filed by the school of-

ficials and a stay of the implementation of the plan was obtained from another district judge because of the trial judge's absence from the district. That stay was vacated by the Fifth Circuit, but was reinstated by Mr. Justice Black acting as Circuit Judge for the Fifth Circuit in an order reported at 404 U.S. 1211 (1971).

On the appeal, the Fifth Circuit, sitting *en banc,* affirmed the district court as to its findings of fact and conclusions of law, but vacated the order as it related to the desegregation plan itself and remanded for further proceedings. A cross petition seeking review by this Court of the Fifth Circuit's order requiring a new plan is pending in this Court, *sub nom., Cisneros* v. *Corpus Christi Independent School District,* Oct. Term 1972, No. 72-668.

Statement of Facts

The district court made exhaustive findings of fact, which are summarized by the Fifth Circuit in its opinion. We respectfully refer this Court to all three opinions, set out in the appendix filed with the cert. petition, and here we will merely summarize the most significant facts as found by the district court.

In sum, this case involves a fact pattern similar to that developed in a number of other school desegregation cases. That is, the school district was found to have adopted and followed a consistent policy of structuring school attendance zones, building and expanding schools, and instituting transfer policies, so as to take advantage of existing residential segregation in the City of Corpus Christi, and hiring and assigning faculty, all resulting in Anglo students attending schools separate from those attended by Mexican-American and black students.

The following are the most important findings of fact of the district court:

1. "Mexican-American students are an identifiable, ethnic-minority class" in the Southwest, Texas,[1] and in Corpus Christi (A. 13-16).

2. Those students "are now separated and segregated . . . in all three levels of the school system" (A. 17, 18-21, n. 36-37), even to a greater degree than they are segregated residentially (A. 37-38).

3. There has been an historic pattern of discrimination against Mexican-Americans in the Corpus Christi school district which contributed to their segregation in the schools (A. 21-27, n. 38-40).

4. Negro students are also segregated in the system, as are both Mexican-American and Negro faculty members (A. 27-29; 35, n. 56; 41).

5. Expert testimony established that the segregation of Mexican-American and Negro students causes them to suffer "harmful effects," including "psychological and emotional trauma, and scarring and crippling." (A. 42; 7. n. 26.)

6. The segregation in the schools was not simply the result of residential segregation. Rather:

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[1] See, United States Commission on Civil Rights, MEXICAN AMERICAN EDUCATION STUDY, Report 1: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest, April, 1971, pp. 21-38; Inter-Agency Committee on Mexican-American Affairs, El Paso, Tex., October 26-28, 1967, p. 98; Texas State Advisory Committee to the United States Commission on Civil Rights, THE CIVIL RIGHTS STATUS OF SPANISH-SPEAKING AMERICANS IN KLEBERG, NUECES, AND SAN PATRICIO COUNTIES, TEXAS (July, 1967); and the studies cited in *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 Houston Law Review, 929, 939, n. 75.

> The court is of the firm opinion that administrative decisions by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subjective transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or "corridor" schools, by bussing some students, by providing one or more optional transfer zones which resulted in Anglos being able to avoid Negro and Mexican-American schools, not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, by assigning Negro and Mexican-American teachers in disparate ratios to these segregated schools, and further failing to employ a sufficient number of Negro and Mexican-American school teachers, and failing to provide a majority-to-minority transfer rule, were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system.

(A. 31-36, n. 50-57.)

7. The explanations of the defendant school officials for their adopting and following the above policies were not adequate to establish their independent validity (A. 41).

From these findings of fact, which are fully supported by the record,[2] the district court drew the following con-

[2] Throughout its opinion, the court makes reference to the exhibits and testimony introduced at trial. See, *e.g.*, A. 3-7; 7, n. 26; 17-21, n. 37; 22-26, n. 38-40; 31-36, n. 50-57. The decision describes the trial judge's exhaustive study and analysis of the evidence (A. 2), and points out the extent to which it was necessary to resolve factual disputes (A. 6-8, n. 26).

clusions of law. First, the school district was segregated in violation of the Fourteenth Amendment as to both Negro and Mexican-American students. The former had formerly been segregated pursuant to statute and that dual system was never disestablished. The latter were segregated as a result of the above described policies of the school district. Second, this segregation could not be remedied "by placing Negroes and Mexican-Americans in the same school" (A. 29). Rather, the duty was on the school district to adopt a plan that would result in a unitary system within the meaning of decisions of this Court and the Fifth Circuit.

To this end, further proceedings were held, resulting in the decision of July 2, 1971 (A. 54-97). The court required a comprehensive plan to be adopted in compliance with the standards established by this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971) (A. 76-77, 82).

Reasons Why the Writ Should Be Denied

Despite the arguments made by the petitioner school district, it is clear that the Court of Appeals and the district court both followed long-standing decisions of this Court and adhered to its most recent decisions regarding school desegregation. Thus, this case does not present any new issues of law, nor do the decisions below conflict with decisions of this Court or with those of other circuits. In essence, the quarrel of petitioners is with the findings of fact made by the district court and affirmed by the Court of Appeals. However, petitioners present no basis for this Court's holding that those fiindings are clearly erroneous. Therefore, this case does not warrant review by this Court on certiorari.

I.

The Factual Allegations Made by the Petitioners Were Resolved Against Them by the District Court, and There Is No Basis for the Review of These Findings Here.

Since a number of the legal arguments made by the school district are based on its characterization of the facts, some preliminary discussion of what was actually found by the trial court is necessary. Basically, petitioners present *their* version of the facts as though it was undisputed, and generally disregard or misstate the trial court's findings. In essence, the petition seeks to retry the facts here after having had adverse findings below. Of course, this Court does not sit as a trial court, and petitioners have simply failed to sustain their burden of demonstrating that the Court should grant review on the ground that the findings are clearly erroneous under Rule 52(a), Fed. R. Civ. Proc.

Some examples of disparities between factual assertions in the petition and the findings of the trial judge are illustrative:

1. The petition asserts that, "the record is . . . devoid of evidence of discrimination against Mexican-Americans in the community" (Petition for Writ of Certiorari, p. 8). To the contrary, the district court found that there *was* such discrimination, based that finding on extensive testimony (A. 22-26, n. 38-40), and further found that this discrimination contributed to school segregation (A. 27).

2. The petition asserts that there was "no evidence" that school boundaries were established or changed for the

purpose of segregation (Pet. 11). The district court found that decisions "in drawing boundaries" and locating and expanding schools "were . . . calculated to, and did, maintain and promote a dual system" (A. 31, 36), and gave examples (A. 31, n. 50).

3. The petition states that the record did not show "ethnic imbalance as a result of discrimination" and that the trial court did not so find (Pet. 12). The district court found that the historical pattern of discrimination contributed to segregation (A. 27), and that segregation resulted from the actions of the school board (A. 31-36).

4. The petition states that in 1969 "no school in the District had a teaching staff of more than 50% Mexican-American and only two . . . had a combined Negro-Mexican-American staff exceeding 50%" (Pet. 11). While this statement is literally true, it is misleading in light of the small percentage of Mexican-American (17.3%) and Negro (3.1%) teachers employed in the system (A. 35, n. 57). The point is, as the trial court found, that those teachers were concentrated in schools with predominantly Mexican-American and/or Negro student bodies (A. 34-35, n. 56; 41; 17-20, n. 37).[3]

5. Finally, in arguing that certiorari should be granted, it is stated that there was no evidence that isolation on the basis of national origin caused damage to Mexican-American students of the sort contemplated by *Brown* v. *Board of Education* (Pet. 20-21). To the contrary, the district

[3] For example, in Barnes Junior High, 94.03% of the pupils and 38.46% of the teachers were Mexican-American, so that the percentage of Mexican-American teachers was more than twice the percentage in the system as a whole. In Sundeen Junior High, on the other hand, 21.60% of the pupils and 3.03% of the teachers were Mexican-American (A. 18).

court made precisely that finding, and based it on extensive testimony of an expert witness (A. 42; 7, n. 26).

In noting these disparities between the assertions of the petitioners and the findings of the district court, our intent is not to engage in this Court in a dispute over what were the facts. Our point is that the trial court found the facts in our favor (A. 49), that its findings are clearly supported by the record, and petitioners have provided no reason for this Court reviewing this case for the purpose of overturning them.

II.

The Decision of the Court of Appeals Is Fully In Accord With Decisions of This Court and Those of Other Circuits.

Essentially, the petition seeks to create a case that is appropriate for certiorari by characterizing the Fifth Circuit's opinion as being a radical departure from prevailing law. An examination of what the Court of Appeals in fact held, however, demonstrates that the court adhered in all respects to established precedent.

First, petitioners urge that the court's abandoning of the distinction between "*de jure*" and so-called "*de facto*" segregation requires review by this Court. However, it is clear that the Fifth Circuit was simply addressing itself to the contention that segregation is unconstitutional, or "*de jure*," only if it had been mandated by statute; otherwise it is "*de facto*" and unassailable. The court was obviously correct in rejecting that position, for whatever may be thought to be the meaning of the *de-jure—de-facto* distinction, it does not rest on the presence or absence of statutorily mandated segregation.

Of course, the existence of such a statute makes the proof of state-created segregation relatively simple. But it still can be proved, as in this case, by showing that the segregation or discrimination resulted from actions of state officials acting without explicit statutory authority, just as, for example, such unconstitutional discrimination can be shown in jury discrimination cases.

Indeed, *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), supports this conclusion in two respects. There, this Court was, of course, dealing with segregation originally imposed pursuant to statute. But the lengthy discussion of issues such as school placement, attendance zones and faculty ratios makes it clear that constitutional violations arise by school board actions that create or perpetuate segregation even in the absence of a statute. In addition, this Court addressed itself briefly to the *de facto—de jure* distinction in discussing the meaning of Title IV of the Civil Rights Act of 1964 in relation to school desegregation litigation. By describing "so-called 'de facto segregation'" as segregation "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities" (402 U.S. at 17-18), it was made clear that segregation that was so caused violated the Fourteenth Amendment whether or not a statute mandated the action.

Thus, it is clear that all the Fifth Circuit did in its discussion of *de facto—de jure* segregation was to abandon what it believed, and rightly in our opinion, to be confusing terminology. Thus, its holding was simply that the question in a school desegregation case was whether the segregation was "unconstitutional" in the sense that it was caused by and was the result of state action, whether or not such action was under the specific command of a statute (A. 127-130). In so defining the issue, of course, the court

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below followed decisions of this Court going as far back as *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

Second, petitioners argue that the holding of the court below that there is no necessity for showing that the policies of the school board were adopted with the specific intent of discriminating against Mexican-American students conflict with decisions of this Court. The holding of the Fifth Circuit, however, is wholly in accord with decisions which explicitly hold that it is unnecessary to attempt to uncover the underlying motivations of state officials in racial discrimination cases. Rather, the proper focus is on the *effect* of their actions. See, *Palmer* v. *Thompson,* 403 U.S. 217, 224-226 (1971).

Indeed, the Fifth Circuit relied upon and followed this Court's most recent pronouncement on school segregation, *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). In *Wright,* this Court rejected the Fourth Circuit's holding that the purpose or motivation of a school board's action must be looked to to determine whether it violated the Constitution. The Court held:

> It is true that where an action by school authorities is motivated by a demonstrated discriminatory purpose, the existence of that purpose may add to the discriminatory effect of the action by intensifying the stigma of implied racial inferiority. . . . But as we said in *Palmer* v. *Thompson,* . . . it "is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators," and the same may be said of the choices of a school board. 407 U.S. at 461-62.

Thus, the question in any case arising under the Fourteenth Amendment is whether there has been a violation

of its mandate. Rather than trying to search the minds of state officials as to the underlying purpose or motivation of their actions, it is appropriate for a federal court to limit its inquiry to whether those actions have had the effect of denying equal protection. The district court here made precisely that inquiry and found that the policies adopted by the school board had the proscribed effect. The standard laid down by the Fifth Circuit—that the school board would be held responsible for the natural and probable results of administrative decisions made with awareness of their effect—is clearly correct.

Thus, contrary to the assertions of the petitioners, the lower court did *not* hold that the mere existence of racial or ethnic imbalance with nothing more constitutes a violation of the Fourteenth Amendment. Rather, it stated a two-pronged test; there must be found a denial of equal educational opportunity because of racial and ethnic isolation,[4] *and* "this segregation must be the result of state action" (A. 129).

In sum, the Fifth Circuit adhered to long-standing precedent established by this Court; in particular, it referred to this Court's decision in *Hernandez* v. *Texas,* 347 U.S. 475 (1954), which held that Mexican-Americans are fully protected by the equal protection clause of the Fourteenth Amendment if they are subjected to discrimination as an identifiable ethnic group.[5] Although *Hernandez* involved jury discrimination, its rationale is applicable to this case. There, as here, there was no history of exclusion of Mexican-Americans from jury duty imposed by statute,

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[4] Of course, reliance on statistical evidence to establish this first element was proper.

[5] As are other ethnic groups. See, *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Korematsu* v. *United States,* 323 U.S. 214 (1944).

as was the case in many southern states with regard to the exclusion of blacks. There, as here, the Court looked to the objective indicia of actions of state officials to determine whether there had been a constitutional violation, and avoided the impossible task of probing their innermost motivations.

Finally, the decision below does not conflict with that of other circuits. Rather, the Courts of Appeals are in agreement that actions such as those of the Corpus Christi School District which perpetuate or result in school segregation violate the Fourteenth Amendment to the Constitution. *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied,* 404 U.S. 913 (1971); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786 (N.D. Ill. 1966), *aff'd* 404 F.2d 1125 (7th Cir. 1968), 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972); *cf. Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1035 (8th Cir. 1970), 449 F.2d 493 (8th Cir. 1971); *United States* v. *Board of Educ.,* 429 F.2d 1253 (10th Cir. 1970).[6]

[6] Petitioners make a final argument—that if they are required to desegregate they must be given a "reasonable" time to do so. This seems to be little more than an attempt to resurrect "all deliberate speed," a standard abandoned by this Court in 1964. *Griffin* v. *School Board of Prince Edward,* 377 U.S. 218, 234 (1964). Of course, once a constitutional violation has been established it must be remedied immediately. *Alexander* v. *Holmes County Board of Ed.,* 396 U.S. 19 (1969). There has already been a delay of one and one-half years in the implementation of *any* plan for the district.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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